72-1395

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IN THE

Supreme Court of the United States

October Term 1972

No. 72-1395

GRIFFIN & BRAND OF McALLEN INC., *Petitioner*

v.

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Respondent*

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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GRIFFIN & BRAND OF McALLEN, INC., PETITIONER, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 4, 1973.

OPINION BELOW

The opinion of the District Court for the Southern District of Texas, Brownsville Division, is reported at 68 LC #32682. The opinion of the Court of Appeals for the Fifth Circuit is reported at both 70 LC #32820 and 471 F.2d 235.

JURISDICTION

The District Court for the Southern District of Texas, Brownsville Division, entered an opinion on March 31, 1972, a copy of which is appended to this petition in the Appendix at page 36, and entered its judgment on April 20, 1972, a copy of which is appended to this petition in the Appendix at page 44. The opinion of the Court of Appeals for the Fifth Circuit was rendered and entered on January 4, 1973, a copy of which is appended to this petition in the Appendix at page 25, as was the judgment of the Court, a copy of which is appended to this petition in the Appendix at page 33. An extension of time in which to file a Motion for Rehearing until February 12, 1973, was granted on January 15, 1973, and a Motion for Rehearing In Banc was duly filed, which the Court of Appeals for the Fifth Circuit denied, by an Order entered on March 9, 1973, a copy of which is appended to this petition in the Appendix at page 35. The Mandate was stayed until April 21, 1973, by an Order dated March 22, 1973, pursuant to a Motion to Stay the Mandate.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The "crew leader system" is virtually the only system used by the farmer and processor in harvesting fruit and vegetables throughout substantially all of the agricultural producing areas of the United States. In 1966 agricultural employees became subject to the Fair Labor Standards Act for the first time. Shortly thereafter an administrative determination was requested as to whether the "crew

leaders" were Independent Contractors for purposes of the Fair Labor Standards Act, thus making the harvestors the crew leaders' employees, or whether they were the employees of the farmer or processor, such as the PETITIONER. The written administrative determination made by the Labor Department at that time and circulated among the agricultural industry to the effect that crew leaders were and could be Independent Contractors under the Fair Labor Standards Act, and this administrative determination is now challenged by the Labor Department in this case.

PETITIONER, who operates farms in the lower Rio Grande Valley and Wintergarden areas of South Texas, and processing plants in the lower Rio Grande Valley, relied upon the written administrative determination made by the United States Department of Labor as well as their attorney's advice in resisting the Wage and Hour investigator's insistence that the crew leaders were not Independent Contractors and his harvestors were PETITIONER'S employees.

As a result of PETITIONER'S position, the Department of Labor instituted a suit against PETITIONER for an injunction to keep the PETITIONER from violating the minimum wage, child labor, and record keeping provisions of the Fair Labor Standards Act, and for recovery on behalf of all the harvestors employed by the crew leaders of wages due and owing as a result of their failure to be paid in accordance with the provisions of the Fair Labor Standards Act though this portion of the suit was later dropped. The admitted purpose of the suit was to determine whether the harvest hands who worked for crew leaders retained by PETITIONER were employees of PETITIONER, or were employees of the

crew leaders who were Independent Contractors as the Labor Department's unretracted official opinion stated they were, under the terms of Fair Labor Standards Act. The District Court, in deciding this case, noted that the determination of this case will determine this question for not only PETITIONER but for all other farmers and processors in South Texas.

The questions presented in this application are:

(1) Are employees of a business which renders a harvesting service to the agricultural industry also employees of the farmer or processor who retained the harvesting service and for whom said crew leader rendered his services?

(2) Did the opinion of the District Court and Fifth Circuit completely ignore previous holdings of this Honorable Court and other circuit courts which set forth the factors, the totality of all which must be considered in determining whether under the Fair Labor Standards Act an Independent Contractor or employment relation was presented?

(3) Whether PETITIONER, who in good faith relied upon administrative decisions of RESPONDENT, as well as its attorney's advice to the fact that the harvestors employed by the "crew leaders" were under the Fair Labor Standards Act Independent Contractors and their harvest hands their employees and not employees of PETITIONER, should have an injunction issued against it when the Courts change completely the previous written and official administrative determination made by RESPONDENT.

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent portions of the Statutes are 29 *U.S.C.* 203(d), (e), (g), and (l); 206(a) and (a)(5); 211(c); 212(a), and (c); 213(a), (a)(6)(a), and (c)(1); 215(a), (a)(1), (a)(2), (a)(4), and (a)(5); and 217, all of which are portions of the Fair Labor Standards Act. The pertinent portion of the Rules and Regulations of the Wage and Hour Division, United States Department of Labor, is the official interpretation of the question presented by this application, *Opinion Letters 640 and 658*. The Statutes and opinion Letters are appended to this application in the Appendix beginning at page 46.

STATEMENT

This suit was originally brought in behalf of the United States Department of Labor pursuant to Section 17 of the Fair Labor Standards Act, 29 *U.S.C.* 217, for an injunction to restrain PETITIONER from violating certain portions of Section 15, Fair Labor Standards Act, 29 *U.S.C.* 215, specifically subsections (a)(1), (a)(2), (a)(4), and (a)(5) concerning the employers' responsibility for payment of minimum wage, child labor, and record keeping.

Almost all vegetables and fruits in this country are havested by employees of "crew leaders." In the Mississippi River basin a large portion of the crew leaders are based in the lower Rio Grande Valley where PETITIONER conducts most of its operations. PETITIONER engages crew leaders for harvesting over a period of several months during the year on a day to day basis. During the remainder of the year the crew leaders in

question are working in different areas of Texas and other states in the United States for other farmers or processors.

PETITIONER handles its employment of the crew leaders through its chief fieldman. The crew leaders will call upon PETITIONER'S chief fieldman each afternoon to find out what crop is to be harvested the following day (App. 334, 346, 348 & 390), the fields out of which each is to harvest (App. 286, 309, 334, 346, 734-738 & 783), the price to be paid to them by PETITIONER per unit (App. 730), and the time of day operation is to commence (App. 349, 389 & 392).

On large fields, more than one crew would be harvesting with each crew being assigned a different row (App. 287, 347 & 391). During the day fieldmen for PETITIONER would check the progress of the work (App. 392), give truck tickets (App. 337), and advise the crew leader of the number of truck loads still needed (App. 349 & 393). The crew leaders supervise their harvest hands; the hiring and firing of the hands (App. 306 & 366); seeing that bad vegetables or fruit are eliminated from the harvest (App. 374); determine the size of their crew (App. 228-320); determine their hands' pay period (App. 306); determine whether, for example, the onions should be immediately sacked or dried first (App. 393); and furnished the harvesting equipment used by his harvesting employees (App. 307, 367-369, 693, 702 & 723). PETITIONER'S employees never supervised the harvest hands in any manner, never criticized their work, or gave them any instructions, but took any criticism, requests and other problems to the crew leaders who took whatever action he deemed appropriate (App. 310-311, 366 & 368).

All of the crew leaders did a bulk of their work throughout the mid-west in areas far from South Texas though they followed the same procedure with other farmers and/or processors as they do with PETITIONERS, (App. 361-362, 363-365, 303-305, 314-315, & 724-725). All of the crew leaders performed harvesting services for many different organizations and persons in the agricultural industry in South Texas and in other parts of the United States.

The crew leaders each own from one to three 2½ ton trucks costing in excess of $5,000 each, which they purchased and maintain themselves for use in their harvesting business (App. 304, 367, 412, 691-692, 694, 701-702, 710, 713, 722 & 726). Some even own busses for transporting their crews to and from the place of employment (App. 722-723). As already noted, the crew leaders own the harvesting equipment. During a full week each can clear, by operating two trucks, from around $300.00 (App. 693-695) to $500.00 or $600.00 by operating three trucks (App. 718-719, & 724-725).

Crew leaders used by PETITIONER in harvesting in 1971 did up to roughly sixty days work for PETITIONER and received, according to the IRS 1099 form, which also contained the crew leaders' employer's identification numbers (App. 643 & 745-746), from $25,355.33 to $50,896.85 (App. 758-759 & 781). Of course the crew leaders also filed an income tax return as a proprietor of a business (App. 636-638, 641-642, 650 & 685).

The crew leaders individually insisted that they were independent businessmen and that their earnings depended upon how efficiently they ran their businesses (App. 369-375, 703-704, 691, 711, 725 & 786).

The crew leaders operated out of their homes (App. 372, 377 & 715) without the benefit of a separate office (App. 284, 344, 388, 699-700, 715 & 727). Some of them operated without using a bank account (App. 284, 288, 388, 698 & 716), though some did use bank accounts (App. 704 & 727). Many of the crew leaders paid their hands daily since the hands were often recruited for only the day from Mexico, though the crew leaders were only paid weekly by PETITIONER. Most crew leaders solved the resulting cash flow problem by having PETITIONER advance them funds from one to three times a week, provided they were working with PETITIONER during that week, out of which they paid the harvest hands (App. 290-292, 332, 396-397). Occasionally a crew leader would borrow money from PETITIONER, whose operation is in the same area as the crew leader's permanent residence, for various purposes and periods of time (App. 312, 393, 397, 403, 717 & 727).

PETITIONER also furnished payroll forms to the crew leaders and requested them to complete, maintain, and return a copy of the records to PETITIONER in order that the Social Security and other laws could be complied with (App. 296-297, 356-358, 377, 403-405, 406, 655-658, 664-665, 733-734 & 735-736). PETITIONER also held the crew leaders' and their employees' Social Security tax in escrow. The PETITIONER had assisted the crew leaders in their employment of a bookkeeper to whom a copy of the payroll records would be sent each week. The bookkeeper would keep the records necessary for the Social Security and compile the Social Security tax return annually for the crew leaders' operation with PETITIONER. PETITIONER would pay out of the escrow

fund the amount of tax it was instructed was due by the bookkeeper, with the bookkeeper being paid his fee out of the excess in the escrow fund and the balance being refunded to the crew leader (App. 646, 648-649, 688-689, 670-671, 681-682, 686-687 & 776-777).

PETITIONER, who had been investigated several times by the Wage and Hour Division, had a perfect record as far as its own employees were concerned (App. 506-507, 632-633, 634, 653-654 & 763-764); though the status of the harvest hands was disputed. The PETITIONER, though maintaining that the crew leaders were Independent Contractors for purposes of the Fair Labor Standards Act, citing the advice of its attorney and the two administrative opinions issued by the Wage and Hour Division (App. 749-751, 764-765 & 771-772), attempted to do everything it could to cooperate, especially because of the problem presented by the "hot goods" provision of the Fair Labor Standards Act. The payroll forms were devised and revised several times in cooperation with the representative of the Wage and Hour Division because they were told by RESPONDENT'S investigator that this would keep PETITIONER from violating the "hot goods" provision of the act and because they desired to cooperate with the government and particularly RESPONDENT (App. 623-625, 627-628, 655-658, 747-749, 751-752, 768-776, & 790).

PETITIONER'S business involves growing crops on land which they own or lease, buying growing crops which are owned by others, all of which are processed and sold by grade and quality, and acting as marketing agent for crops produced and processed by others (App. 270-271).

This case is unusual in one aspect and it is that for all practical purposes there was no dispute as to the above

facts so there is no question of the Trial Court finding the facts against PETITIONER. It is a question of law, whether under these facts the crew leaders' employees could also be the employees of PETITIONER.

REASONS FOR GRANTING THE WRIT

After the agricultural industry became subject to the Fair Labor Standards Act by amendment in 1966, the question soon arose concerning the status of the crew leaders and more specifically that of the harvest hands which the crew leaders employed. Were the crew leaders Fair Labor Standards Act Independent Contractors, or were they not? Were the harvest hands employees of the farmer or processor using their crew leaders, or were they not? Since crew leaders were used throughout most of the agricultural producing areas of the United States, this was a question of utmost importance to the agricultural industry. The question was presented to the Wage and Hour Division whose opinion was asked. The Division administrator answered the question with *Opinion Letter 640* which he supplemented approximately a month later with *Opinion Letter 658,* in which he discussed some of the factors which the Courts have stated should be used to determine whether a FLSA Independent Contractor relationship existed and found that the crew leaders were FLSA Independent Contractors, whose employees were not the employees, nor the responsibility, of the farmer or processor employing the crew leaders. Those two opinion letters are appended to this brief beginning at page 50. Said opinion letters have not been retracted, revoked or modified, yet the Labor Department has filed several suits asking the Courts to determine that the farmer and processor are the employers of the harvest hands working for

the crew leaders and that the crew leader is not a FLSA Independent Contractor.

This case has been the first to go through the trial and appellate stages and hence will be the determinative case for the agricultural industry of this country. If the PETITIONER is the employer or joint employer of the harvest hands working for the crew leaders it retained, then every other farmer or processor in the United States who uses a crew leader is at least a joint employer of said crew leaders' harvest hands as far as the Fair Labor Standards Act is concerned. The Trial Court, and Circuit Court, in holding that PETITIONER, GRIFFIN & BRAND OF McALLEN, INC., was the employer of the harvest hands, appeared to take the position that the crew leader was also an employer of the field hands, creating a joint employer relationship; yet the PETITIONER is still left with the responsibility of keeping the records for the harvest hands, paying the harvest hands, and supervising the harvest hands to protect themselves under this Court order, as will every other farmer or processor in the agricultural business. This eliminates the crew leader, yet leaves the problem of recruiting hundreds and thousands of harvest hands, transporting them to the harvest, and more importantly, supervising the hands and keeping the necessary records. The duration of the effort is only for a few weeks at differing times during the course of the year, which must be handled by a mere handful of permanent personnel who are numerically and woefully inadequate to handle such a multitude of people. Certainly PETITIONER will not have the problem in recruiting and transporting harvest hands that most farmers and processors throughout the country will have because they are in the base area for such harvest

hands. Obviously, the effect of refusal to grant the writ will be to substantially increase the size and complexity of any farming operation as well as the cost, which must be passed along by further increase in the price of food.

Undoubtedly a great deal of emphasis will be placed upon the broad definition of employer-employee with the Fair Labor Standards Act and the question asked, "Surely this is broad enough to include the PETITIONER'S relationship with the harvest hands." Without the application by the Courts of common law, common sense, and a large measure of social conscience, the definitions within the Fair Labor Standards Act is only a redundant non-definitive definition somewhat more vague than "a rose is a rose is a rose." It is the decision law which gives meaning to the statute. Admittedly something was intended by Congress more than the common law master-servant relationship since this definition can easily be construed to "encompass all employed humanity," *Walling v. Sanders,* 136 F.2d 78 (6th Cir., '43). However, this Court has long made it clear in referring to the definition of employer-employee relationship that "this does not mean that all who render a service to an industry is an employee," *United States v. Silk,* 67 S.Ct. 1463, 331 U.S. 704 (Sup Ct., '47) This Court has set out a variety of factors to be considered in determining whether the employee is the employee of the industry or of another person, an Independent Contractor. If under these tests an Independent Contractor is not a FLSA Independent Contractor, the employee is an employee of the industry, but if he is the employee of a FLSA Independent Contractor he is not the employee of the industry, a matter which cannot be circumvented by calling him a joint employee.

The tests set out by this Court in the leading cases, *Rutherford Ford Corp. v. McComb,* 67 Sup. Ct. 1473, 331 U.S. 722, (Sup. Ct., '47); and *United States v. Silk, supra,* are (1) the amount of control of the industry; (2) the contractor's opportunity for profit or loss; (3) the contractor's investment in equipment and facilities; (4) the permanency of the relationship between the industry and contractor; (5) the skill required by the contractors; (6) how integral a part of the industry's operation is the contractor's operation; (7) whose equipment and facilities are used by the contractor in performing his service; and (8) whether the contractor's business organization could shift its operation from place to place. In another case decided the same year, this Court stated that the custom within the industry was yet another factor to be considered. *Walling v. Portland Terminal Company,* 67 Sup. Ct. 639, 330 U.S. 148 (Sup. Ct., '47). The Fifth Circuit has added to these factors by determining (1) who controls the hiring, firing and employment conditions of the contractor's employees, and (2) whether the contractor can refuse to work for the company and work for others. *Wirtz v. Lone Star Steel Company,* 405 F.2d 668 (5th Cir., '68).

The crew leader has sole control over the hiring and firing of his employees. Not only can he refuse to work for PETITIONER and work for others in the same or different areas, they regularly carry on their contract harvesting business all over the United States and transport their entire business organization from place to place depending upon where harvest is in process during each year. Since the crew leaders have the option whether to work for PETITIONER or not, and do work for other farmers and processors in South Texas and the rest of the United States, their contracting with PETITIONER does

not have the permanency of relationship required for employer or employee relationship. There can be no doubt but that the custom of the agricultural industry is that the crew leaders are Independent Contractors. It is obvious by these five factors, without further discussion or elaboration, that the crew leaders in this case meet the FLSA requirements.

All of the crew leaders have an investment of at least $5,000 as represented by one field truck, not including the investment that most have in two or three field trucks and even bussess for transporting the crews. In addition, they have investments in the harvesting equipment, though somewhat small when compared to the investment in the trucks. It has been settled by this Court as well as other Courts that the ownership of just one truck is a sufficient investment to show a FLSA Independent Contractor relationship. *United States v. Silk, supra; Wirtz v. Lone Star Steel Company, supra; Goldberg v. Warren Brothers Road Co.*, 207 F. Sup. 99 (Maine, '62); *Wirtz v. Manchester Sand, Gravel & Cement Co.*, 236 F. Sup. 885 (N. Hamp., '64).

The uncontradicted testimony of the crew leaders, as well as others familiar with the agricultural industry, agreed that the crew leaders had to exercise initiative, skill, and foresight to be successful. It was exercised in the selection of trucks and equipment to be used and in their maintenance; the control and supervision of the harvest hands; and in selection of the areas where the harvest should be covered. Obviously the crew leader's income depended partially upon the amount of work he handled. This also meets the requirement for a FLSA Independent Contractor.

The evidence of opportunity for profit or loss is not clear cut as the crew leaders tended to minimize what

they made from their business; yet each of the crew leaders, besides owning the trucks and equipment used in their business, own their own homes, one or more cars and pick-up trucks, and one testified he even owned a farm. Another was sending three of his sons, none of which were working, to college, for each of whom he had purchased an automobile. While none of the crew leaders are wealthy, they are not any different from any other small businessman, especially ones who have not had more than one or two years of school, if any, and have a great deal of difficulty communicating in the English language.

The question of whose equipment and facilities are used is conflicting. On one hand, the equipment and trucks used belong to the crew leaders, while on the other hand they are harvesting crops grown by PETITIONER or which PETITIONER has purchased or is handling for its owner. Certainly to the extent of the equipment used, a FLSA Independent Contractor relationship is indicated. The question of ownership of the field or crop fits better into the test of it being an integral part of PETITIONER'S operation. Since PETITIONER'S business is growing, processing, and selling vegetables, the harvesting of the vegetables is an important element in its business. Yet it is not a specialized step in a production line as was present in *Rutherford Food Corp. v. McComb, supra.* It has been held that a similar operation, the harvesting of trees for processing into lumber, that the contractor's harvesting the trees was not an integral part of the lumber company's operation under the facts. *Wirtz v. Kneece,* 249 F. Sup. 594 (S. Car., '66).

The only remaining test is that of control. Basically the evidence was the PETITIONER'S control of the har-

vest was limited to determining the task to be done and establishing its perimeters, all of which was necessary to coordinate the flow of harvested crops into their processing plants. This included such steps as what of the crops to harvest, what fields or section of fields to be harvested, and the number of truck loads needed during the day. It did not include the control of the harvest hands, whether they were employed, or how they did their job, all of which was left up to the crew leaders. This is very unlike the only other recent case which has been decided involving crew leaders. *Hodgson v. Okada,* 472 F.2d 965 (10th Cir., '73). The Tenth Circuit in its opinion of February 7, 1973, noted that:

> "Paul Okada's father, Eddie, worked in the cucumber field almost daily. He instructed Ramon's crew how to perform their work. Eddie Okada directed Ramon not to rehire certain lazy workers and he told Pedro Medelez that if he didn't want to work he could leave,"

all of which items of control are not even remotely presented by this case.

The closest PETITIONER came to exercising undue control over the harvest hands, similar to that over an employee, was the furnishing of and requiring the payroll forms, the system instituted to see that the Social Security tax was paid for the harvest hands, and the setting of a minimum piece rate for the harvest hands. Though the latter matter was the only fact dispute in this case, for the purpose of this appeal it must be taken as established.

Without even attempting to explain these items, they are insufficient to show a FLSA employment relationship as far as the factors of control are concerned under past

judicial decisions, including those of this Court. In all of the "trucker" cases a great deal of control was exercised over the "trucker." The Gray Van Line required the "trucker" to have the company's name on his truck, required him to personally drive the truck unless he got prior company approval for a substitute, required him to comply with extensive company rules and regulations, required him to take a training course, told him where to load and unload, required him to be a member of a union, and required him to report to the company at preset intervals during a trip. *United States v. Silk, supra; Goldberg v. Warren Road Co., supra; Wirtz v. Lone Star Steel Co., supra.*

In yet another case the company would tell the FLSA Independent Contractor's employees, the janitors, what needed to be cleaned in addition to the janitor's ordinary duties and would criticize the quality of their work. *Wirtz v. San Francisco & Oakland Helicopter Airlines, Inc.*, 244 F.Sup. 680 (Calif., '65) aff'd. per curiam 370 F.2d 328; *Dugas v. Nashua Mfg. Co.*, 62 F.Sup. 846 (N. Hamp., '45). Certainly if such control is that of a FLSA Independent Contractor relationship as it was in these cases, the control here is most certainly that of a FLSA Independent Contractor.

Further, there is a rational reason for the action taken by PETITIONER, which could be considered undue control, which is consistent with a FLSA Independent Contractor relationship. Not only was the PETITIONER requested by the Labor Department to assist the crew leaders in complying with the FLSA, they were advised that it was necessary to avoid being in violation of the "hot goods" section of the Fair Labor Standards Act, due to the crew leaders failing to pay minimum wage. Under the

Wirtz v. Lone Star Steel Co., supra, case, the Fifth Circuit requires a business to take affirmative action, including investigating the books and records to guarantee that an Independent Contractor paid his employees in accordance with 29 *U.S.C.* 206. In view of such background it certainly is necessary for the PETITIONER to require payroll forms to show that the harvest hands were paid the minimum wage and logical to set a piece rate to see that they received the minimum wage and thereby avoid handling "hot goods" even though the crew leaders were FLSA Independent Contractors and the harvest hands were not PETITIONER'S employees. The matter of the Social Security tax was only an attempt by PETITIONER to be helpful and show a social conscience after several crew leaders had requested assistance in dealing with the Social Security tax which, due to their lack of educational background and language barrier, presented a problem, particularly with the government forms and technical requirements.

There is still another indisputable reason why the harvest hands are not PETITIONER'S employees under the FLSA. It is the prior administrative rulings of RESPONDENT which are set forth in formal opinions of RESPONDENT, *Opinion* 640 and *Opinion* 658, and included in the Appendix, holding that crew leaders are FLSA Independent Contractors. This Honorable Court, in *Roland Electrical Co. v. Walling,* 66 S.Ct., 413, 326 U.S. 657 (Sup. Ct., '45); and in *United States v. American Trucking Ass'n.,* 310 U.S. 534, 549, 60 S.Ct. 1059, 1069; has held that in determining the meaning or extent of coverage that interpretation by the Wage and Hour Division that "In any case such interpretations are entitled to great weight."

There are only two cases other than *Hodgson v. Okada, supra,* which has already been pointed out as inapplicable, which deals with a harvesting situation. *Mitchell v. Hertzke,* 234 F.2d 183 (10th Cir., '56), deals with the employer status of the crew leaders, the farmer, and the processor which purchased the crop and for whom the crop was being harvested. The Court held that the crew leader and farmer were employers of the field hands without any discussion of this aspect of the case, but held the processor was not an employer. The processor controlled the growing and harvesting of the farmer's string bean crop from before it was planted, and recruited and made available to the farmer crews, though the farmer did not have to use them, but the processor, as in this case, was not concerned with the number of hands involved, nor did he control the hiring and firing of the field hands. The same basic situation is present in *Hodgson v. Okada, supra,* with the exception that it was clear that the farmer was supervising, directing, and even discharging the field hands, unlike here, and the processor was not a party to that case.

The other harvesting case involved the harvesting of trees, *Wirtz v. Kneece, supra.* Here the contractor would cut the trees and saw them into boards the size requested by the lumber company, for which he would be paid so much per thousand board feet. He had an investment of $10,000 in equipment, excluding a portable saw mill which he would rent from the lumber company. Generally the contractor would work for the same lumber company throughout the year, yet they were FLSA Independent Contractors. Certainly these harvesting cases show that there is a FLSA Independent Contractor relationship in our case.

There does not seem to be any area where it is better established that a FLSA Independent Contractor relationship existed than the "trucker" cases. In this connection the owner of a truck will furnish his truck and services to a company and subject himself to extensive control by the company such as has already been discussed. They have investments from $2,500 up to $15,000, with their compensation being so much a unit, such as a mile. Their gross is often in the neighborhood of $15,000. Usually the company for which the work is done requires the trucker to comply with extensive rules and regulations, often the name of the company must be on the truck, and they are forbidden to work for anyone else. It is not uncommon for the company for which the trucker works to provide them some financing, though invariably the trucker has purchased his truck or trucks on his own. *United States v. Silk, supra; Wirtz v. Lone Star Steel, supra; Wirtz v. Manchester Sand, Gravel & Cement Co., supra; Goldberg v. Warren Brothers Road Co., supra; Goldberg v. Bellotto*, 207 F.Sup. 499 (Fla., '62); *Durkin v. Pet Milk Co.*, 115 F.Sup. 628 (W. Ark., '53). The only difference presented by this case is that the crew leader and his crew, besides loading and transporting the load will also gather the load to be transported by harvesting a crop. It is logically imperative that if the truckers are FLSA Independent Contractors, as this Court and other Courts have held, that the crew leaders must also be FLSA Independent Contractors.

Under the judicial constructions of the Fair Labor Standards Act, the harvest hands employed by the crew leaders who contracted with PETITIONER are employees only of the crew leader and not an employee, joint or otherwise, of PETITIONER, a conclusion which was

reached by RESPONDENT'S administrative determination. Yet RESPONDENT is now contending the opposite of their prior position. It would appear that RESPONDENT has decided for some reason that it desires to extend its scope, power, and authority. In making the attempt they do not care to consider the administrative determination that they had heretofore made, nor to apply the factors the Courts have determined should be considered to logically and correctly determine the results of this case since both inescapably lead to the decision that the crew leaders are FLSA Independent Contractors and their employees, the harvest hands, are not employees, joint or otherwise, of the PETITIONER.

The Trial Judge correctly stated that this decision would control the entire agricultural industry in the United States in its application. This is and was the test case chosen by RESPONDENT to achieve its goal of overruling and changing its own previous administrative determination of this very question and to obtain the stamp of judicial approval thereon. This question, which will be determined by this case, is of great importance to the agricultural industry throughout the country and as such certainly deserves consideration by this Honorable Court.

As has been demonstrated, the Trial Court, with the approval of the Circuit Court, disregarded the prior decisions of this Honorable Court, and the administrative rulings of Respondent (Wage & Hour Division U. S. Labor Department) and in effect held that employees, the harvesters, of a crew leader, were for the purpose of the F.L.S.A. employees whomever contracted with the crew leader though under prior judicial and administrative decisions the crew leaders were Independent Contractors

under the F.L.S.A. and the harvest hands were solely those of the crew leader. With this erroneous concept of law and fact, the Trial Court had to determine whether under the Act and prior decisions an injunction should be issued against PETITIONER to keep it from violating the F.L.S.A.

Here the PETITIONER had a perfect record of compliance with F.L.S.A. and relied on prior administrative rulings of the Wage & Hour Division of the Labor Department and on its then attorney's advice that the harvesters employed by the crew leaders were not PETITIONER'S employees; and followed the advice and directions of a F.L.S.A. Investigator in preparing a form to require the crew leaders to complete so PETITIONER could avoid any question or problem regarding the "hot Goods" section of the F.L.S.A. The only problem arose when PETITIONER chose to abide by the written administrative rulings of the Wage & Hour Division of the U. S. Labor Department and that of its attorney rather than the advice as to the law and its effect from an Investigator of the Wage & Hour Division of Respondent who had no legal education or training. Yet the Court held that because of this conduct, PETITIONER should be enjoined. Obviously the injunction could not have been issued, unless this Court changes the law and holds that a crew leader is not an F.L.S.A. Independent Contractor.

Injunctions in F.L.S.A. cases are based, not upon past violations as a punishment for the party, but upon a need to require the party to comply with the law because his promise to do so cannot be depended upon for as demonstrated by past acts. *Mitchell v. Hertzke, supra; Buckley v. Wirtz*, 326 F.2d 838 (10th Cir. '69); *Schultz v. Salinas,*

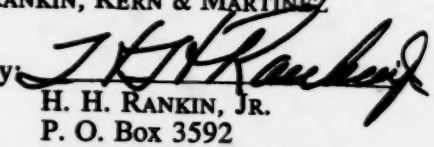
416 F.2d 412 (5th Cir. '69). (A case against a crew leader who the Department of Labor contended was the sole employer of the harvest hands.) Here PETITIONER has done everything short of making the field hands its employees in an attempt to cooperate with the government and see that the F.L.S.A. is complied with. Therefore, the only possible basis for the injunction is punishment.

Also, PETITIONER consulting its attorney about the status of the crew leaders and relied upon his advice, which heretofore has been shown to be well founded, and upon RESPONDENT'S own formal opinions that the crew leaders were F.L.S.A. Independent Contractors. It is well settled that reliance upon an attorney's advice, provided there is a reasonable basis for it, is a valid defense to the issuance of an injunction. *Hodgson v. Parke, dba Southwestern Guard Service,* 413 F.2d 1364 (5th Cir.; '69); *Van Dyke v. Bluefield Gas Co.,* 210 F.2d 620 (4th Cir.; '54); and *Mitchell v. Blanchard,* 272 F.2d 574 (5th Cir.; '59). The fact that the Labor Department is forced to file a suit to resolve the issue does not change the situation or require an injunction, especially if the government is attempting to change the law and their own interpretation of it, *Wirtz v. G & W Packing Co.,* 324 F.2d 802 (4th Cir.; '63), especially since the only way the Labor Department can proceed is by a suit for an injunction. *Mitchell v. Lublin, McGaughy & Assoc.,* 79 Sup. Ct. 160 (Sup. Ct.; '59). Certainly this is true here. Not only is there a valid defense to an injunction, but the only basis there can be for it is to punish PETITIONER for having the audacity to disagree with an investigator of RESPONDENT and insist the question be judicially determined.

PRAYER

For the reasons set forth above, it is respectfully submitted by PETITIONER, GRIFFIN AND BRAND OF McALLEN, INC., that this PETITION for a WRIT OF CERTIORARI should be granted.

RANKIN, KERN & MARTINEZ

By: 

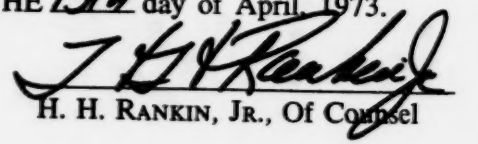
H. H. RANKIN, JR.
P. O. Box 3592
McAllen, Texas 78501
(512) 682-2891

Attorney for Petiitoner

CERTIFICATE OF SERVICE

I, H. H. RANKIN, JR., of Counsel, do hereby certify that I have this day forwarded three (3) copies of the above PETITION for WRIT OF CERTIORARI to the United States Department of Labor, Office of the Solicitor, Carin Ann Clauss, Room 4141, Main Labor Building, 14th and Constitution Avenue, N.W., Washington D.C. 20210 and three (3) copies of the above PETITION for WRIT OF CERTIORARI to the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing the same in the United States Mail, airmail, certified mail, return receipt requested, postage prepaid.

DATED THIS THE 13th day of April, 1973.



H. H. RANKIN, JR., Of Counsel

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2441
Summary Calendar*

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

GRIFFIN AND BRAND OF McALLEN, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(January 4, 1973)

Before THORNBERRY, COLEMAN and INGRAHAM,
Circuit Judges.

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* Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al,* 5th Cir. 1970, 431 F.2d 409, Part I.

THORNBERRY, Circuit Judge: The Secretary of Labor brought this suit under 29 U.S.C.A. § 217 to enjoin Griffin and Brand of McAllen, Inc. from violating the minimum wage, record keeping, and child labor provisions of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. The district court after trial without a jury found that Griffin and Brand had violated the Act and issued an appropriate injunction. Griffin and Brand appeals and we affirm.

The district court described appellant's method of doing business and relationship to the harvest workers in part as follows:

"Defendant Griffin and Brand of McAllen, Inc. is engaged in the cultivation, harvesting, handling, packaging and marketing of fruit and vegetables in various counties of South Texas, including Hidalgo County. Defendant owns and operates a large fruit and vegetable warehouse and packing establishment in McAllen, Texas, and conducts farming operations. There is no question, and defendant admits, that the farm produce handled by defendant is transported, offered for sale, and shipped in interstate commerce.

"Defendant Griffin and Brand engages in harvesting operations for onions, carrots, tomatoes, peppers and other crops. An efficient harvest naturally necessitates a great amount of manual labor, and the required labor force is drawn in large measure from both resident and migrant Mexican-American farm workers. Griffin and Brand, as do all others similarly engaged, obtains the services of these farm workers by dealing with so-called 'crew leaders.' 'Crew leaders' are aware of various loca-

tions at which these workers congregate or reside, and hence are able to secure them in substantial numbers on short notice. After a 'crew leader' contacts the laborers, he then transports them to the work site. A 'crew leader' usually only furnishes his truck or trucks, and he uses his truck or trucks not only to take the farm hands to the fields and back to their homes, but also uses the same to haul the harvest from the field to the shed.

"Griffin and Brand secures its necessary labor as follows: 'Crew leaders' in search of jobs contact an agent of Griffin and Brand. If there is work available on a certain day, Griffin and Brand's agent will tell the 'crew leaders' when and where the labor is needed. When the 'crew leaders' arrive at the job site with the harvesting crew, an agent of Griffin and Brand will tell each particular 'crew leader' in what area he is to deploy his crew.

"The 'crew leaders' are usually paid by defendant for the labor supplied with a weekly lump sum, often paid in advance. The 'crew leader' himself, not defendant, is responsible for meting out the earnings of the individual laborers. The 'crew leaders' are paid by what is known as a 'piece rate,' which means that they are paid so much per basket picked. The 'piece rate' varies with the size of the particular vegetable or fruit being harvested. The 'crew leader,' who is paid on this unit basis, in turn pays the laborers on a lower . . . basis, keeping the difference for himself.

* * * *

"The evidence shows that Griffin and Brand, at the suggestion of the Government, kept social security records on behalf of the harvest hands employed to harvest crops.

Before the pay check was given to the 'crew leaders,' Griffin and Brand deducted the social security due from it. Forms were provided the 'crew leaders' by Griffin and Brand, on which they were to keep track of the number of baskets picked. The forms were used by defendant's bookkeeper to determine the amount of social security for each worker. This money, which included both the share of the harvest hand and the 'crew leader,' was then deducted and placed in an escrow account. Weekly reports were sent by Griffin and Brand's bookkeeper to an outside bookkeeper, who was retained to do the 'crew leader's' social security computations. This arrangement was found to be necessary, as the average 'crew leader' has little or no formal education and is totally incapable of seeing that social security is paid in behalf of the harvesting crews. At year's end, defendant's bookkeeper, on the basis of the outside bookkeeper's computations, paid the Government that requisite social security monies from the escrow account, paid the outside bookkeeper, and then refunded any remaining balance to the people designated by the bookkeeper as due a refund. The check paying the social security to the Internal Revenue Service was a check drawn on defendant with a separate check for each 'crew leader.' The 'crew leaders' signed the social security return, not the check."

Further, testimony indicated that appellant, through its field supervisors, exercises considerable control over the crew leaders and the harvest workers. Red Martin, the head field supervisor tells the crew leaders at what hour to begin work and assigns them a certain number of rows or patches to harvest each day according to the number of members in the crew. Martin tells the crew leaders the

rate at which they should pay the harvest workers and whether to pay an hourly wage or a piece rate. Martin and other field supervisors oversee the harvest work in the fields each day and give instructions to the crew leaders, who pass them on to the harvest workers.

On these facts the district court concluded appellant Griffin and Brand was an employer, or a joint employer, of the harvest crews within the meaning of the Fair Labor Standards Act, and enjoined it from violating the child labor, minimum wage, and record keeping provisions of the Act in the future. Appellant does not dispute that the violations occurred, but vigorously denies that it is the employer or a joint employer of the harvest crews. Rather, it argues, the crew leaders, as independent contractors, are the sole employers of the crews. In addition, appellant contends the issuance of an injunction was improper even if it is a joint employer of the harvest crews.

A. Employer-Employee Relationship

The independent contractor status of the crew leaders, if they are independent contractors, does not as a matter of law negate the possibility that Griffin and Brand may be a joint Employer of the harvest workers. "There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees," *Rutherford Food Corporation v. McComb,* 331 U.S. 722, 729, 67 S.Ct. 1473, 1476 (1947), but independent contractor status does not necessarily imply the contractor is solely responsible for his employees under the Fair Labor Standards Act. Another employer may be jointly responsible for the contractor's employees. *E.g., Boire v. Greyhound*

Corporation, 376 U.S. 473, 84 S.Ct. 894 (1964);[1] *Mitchell v. Hertzke,* 10th Cir. 1956, 234 F.2d 183; *Fahs v. Tree-Gold Co-op Growers of Florida,* 5th Cir. 1948, 166 F.2d 40.

Whether appellant is an employer of the harvest workers does not depend on technical or "isolated factors but rather on the circumstances of the whole activity." *Rutherford Food Corporation v. McComb, supra,* 331 U.S. at 730, 67 S.Ct. at 1477; it depends not on the form of the relationship but on the "economic reality." *Shultz v. Hinojosa,* 5th Cir. 1970, 432 F.2d 259, 264. This court has summarized the proper approach to be taken and some important factors to be regarded as follows:

> "Whether a person or corporation is an employer or joint employer is essentially a question of fact. . . . In considering whether a person or corporation is an 'employer' or 'joint employer,' the total employment situation should be considered with particular regard to the following questions: (1) Whether or not the employment takes place on the premises of the company?; (2) How much control does the company exert over the employees?; (3) Does the company have the power to fire, hire, or modify the employment condition of the employees?; (4) Do the employees perform a 'specialty job' within the production line?; and (5) May the employee refuse to work for the company or work for others?"

Wirtz v. Lonestar Steel Company, 5th Cir. 1968, 405 F.2d 668, 669. Since the question of appellant's joint employer

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1. "Decisions that define the coverage of the employer-employee relationship under the [National] Labor [Relations] and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." Rutherford Food Corp. v. McComb, 331 U.S. 722, 723, 67 S.Ct. 1473-74 (1947).

status is one of fact, it is subject to review under the "clearly erroneous" standard. *Id.* at 670.

We do not think the district court's conclusion in this case that appellant was a joint employer was clearly erroneous; on the contrary, we find that it was amply supported by the evidence. Of course, the work necessarily took place on appellant's premises. The testimony that appellant's field supervisors supervised the harvest work tends to indicate an employment relationship. The fact that appellant effected the supervision by speaking to the crew leaders, who in turn spoke to the harvest workers, rather than speaking directly to the harvest workers does not negate a degree of apparent on-the-job control over the harvest workers. The fact that appellant set the rate of pay of the harvest workers, decided whether crew leaders would pay a piece rate or an hourly rate in a given instance, and handled the social security contributions for the harvest workers also tend to indicate an employment relationship. Viewing the total work arrangement, we agree with the district court that appellant was a joint employer and thus responsible for the violations of the Fair Labor Standards Act.

B. Propriety of the Injunction

We should vacate the injunction in this case only if we conclude the district court abused its discretion. "Two factors to be considered in determining whether an injunction should issue are the employer's previous actions of non-compliance and the dependability of its promises for future compliance." *Shultz v. Salinas,* 5th Cir. 1969, 416 F.2d 412, 414. Testimony at trial indicated past violations of the Act and disagreement between appellant

and compliance officers of the Department of Labor concerning its obligations under the Act to the harvest workers. Although an issue was created as to whether appellant at all times acted in good faith reliance on advice of counsel, the district court was competent to evaluate the testimony and determine the dependability of appellant's promise of future compliance. We find no abuse of discretion in the issuance of the injunction.

The judgment of the district court is in all respects AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-2441
Summary Calendar

D. C. Docket No. CA 70-B-65
JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

GRIFFIN AND BRAND OF McALLEN, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

January 4, 1973

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-2441

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

GRIFFIN AND BRAND OF McALLEN, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan. 4, 1973, 5 Cir., 1973, ___ F.2d ___).

(March 9, 1973)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

70-B-65

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

GRIFFIN & BRAND OF McALLEN, INC.,
Defendant

MARCH 31, 1972
MEMORANDUM OPINION

The Secretary of Labor by this suit would have this Court enjoin Defendant, Griffin and Brand of McAllen, Inc., a McAllen, Texas, corporation, from violating the minimum wage, record keeping and child labor provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §201 et seq., hereinafter referred to as the Act. The case was tried to the Court.

Defendant Griffin and Brand of McAllen, Inc. is engaged in the cultivation, harvesting, handling, packaging and marketing of fruit and vegetables in various counties of South Texas, including Hidalgo County. Defendant owns and operates a large fruit and vegetable warehouse and packing establishment in McAllen, Texas, and conducts farming operations. There is no question, and Defendant admits, that the farm produce handled by Defendant is transported, offered for sale, and shipped in interstate commerce.

Defendant Griffin and Brand engages in harvesting operations for onions, carrots, tomatoes, peppers and other crops. An efficient harvest naturally necessitates a great amount of manual labor, and the required labor force is drawn in large measure from both resident and migrant Mexican-American farm workers. Griffin and Brand, as do all others similarly engaged, obtains the services of these farm workers by dealing with so-called "crew leaders". "Crew leaders" are persons who specialize in acquiring and transporting to work areas large numbers of farm laborers. The "crew leaders" are aware of various locations at which these workers congregate or reside, and hence are able to secure them in substantial numbers on short notice. After a "crew leader" contacts the laborers, he then transports them to the work site. A "crew leader" usually only furnishes his truck or trucks, and he uses his truck or trucks not only to take the farm hands to the fields and back to their homes, but also uses the same to haul the harvest from the field to the shed.

Griffin and Brand secures its necessary labor as follows: "Crew leaders" in search of jobs contact an agent of Griffin and Brand. If there is work available on a certain day, Griffin and Brand's agent will tell the "crew leaders" when and where the labor is needed. When the "crew leaders" arrive at the job site with the harvesting crew, an agent of Griffin and Brand will tell each particular "crew leader" in what area he is to deploy his crew.

The "crew leaders" are usually paid by Defendant for the labor supplied with a weekly lump sum, often paid in advance. The "crew leader" himself, not Defendant, is responsible for meting out the earnings of the individual laborers. The "crew leaders" are paid by what is known as a "piece rate", which means that they are paid so much

per basket picked. The "piece rate" varies with the size of the particular vegetable or fruit being harvested. The "crew leader", who is paid on this unit basis, in turn pays the laborers on a lower unit basis, keeping the difference for himself.

It is the Secretary's contention in this case that the vegetable harvesting crews involved were Defendant's employees within the meaning of the Act, and that since these laborers were not receiving the minimum wage, that Defendant is therefore in violation of the terms of the Act.

Defendant, of course, contends that the harvesting crews are not its employees, but those of the "crew leaders", and that the "crew leaders" themselves are "independent contractors" and not the employees of Defendant.

This Court finds it unnecessary to decide whether the "crew leaders" are "independent contractors" or "employees" of Defendant, for in the situation here presented, the result will be the same under the Act. This may be readily determined in light of the Supreme Court's pronouncement that "where the work done, in essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act". *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The Fifth Circuit has held that where the operator of a steel mill utilized independent contractors to haul ore from mine to ore plant, and the operator knew, or should have known, that the contractors violated the minimum wage provisions of the Act, that the operator was in violation of the "hot goods" provision of the Act. 29 U.S.C. 215(a)(1). *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (CA 5 1968). It is clear from the evidence presented at the trial of this case that the harvest-

ing crews engaged in harvesting crops for Griffin and Brand were paid less than the minimum wage, and that Griffin and Brand knew, or should have known, of such violations of the Act.

The period involved in this action was subsequent to February 1, 1969, therefore the minimum wage at which Defendant was required to pay its field employees was not less than $1.30 per hour. Arnoldo E. Garza, a representative of the Texas Department of Agriculture, testified as to a study made by the Texas Department of Agriculture to determine the productivity of harvesters of agricultural commodities, including the harvest of onions and carrots in the Rio Grande Valley during the years 1969 and 1970. Garza participated in timing groups of workers and calculating the number of baskets the average worker was able to pick per hour. The survey showed that the average worker picked 4.45 baskets per hour when harvesting onions. Since the average piece rate for the harvest hands was 23 to 25 cents per basket, it may be easily seen that the average laborer, even at 25 cents per basket earned around $1.11 per hour. For carrots, the average piece rate was from 14 to 15 cents per basket. According to the survey, a worker could pick 7.65 baskets per hour. At a rate of 15 cents per basket, the average worker would earn around $1.15 per hour. The evidence shows that Griffin and Brand kept no records of the number of hours worked by laborers on a piece rate basis, nor did their "crew leaders".

The testimony of a U. S. Department of Labor Compliance Officer revealed that the production figures from the Texas Department of Agriculture survey were applied to Griffin and Brand's operations to determine the average hourly wages of the harvest hands working in Griffin and

Brand fields. It was determined that in numerous specific instances, laborers were underpaid in small amounts, which varied from $1.00 to $8.00 per week.

The evidence shows that Griffin and Brand, at the suggestion of the Government, kept social security records on behalf of the harvest hands employed to harvest crops. Before the pay check was given to the "crew leaders", Griffin and Brand deducted the social security due from it. Forms were provided the "crew leaders" by Griffin and Brand, on which they were to keep track of the number of baskets picked. The forms were used by Defendant's bookkeeper to determine the amount of social security for each worker. This money, which included both the share of the harvest hand and the "crew leader", was then deducted and placed in an escrow account. Weekly reports were sent by Griffin and Brand's bookkeeper to an outside bookkeeper, who was retained to do the "crew leader's" social security computations. This arrangement was found to be necessary, as the average "crew leader" has little or no formal education and is totally incapable of seeing that social security is paid in behalf of the harvesting crews. At year's end, Defendant's bookkeeper, on the basis of the outside bookkeeper's computations, paid the Government that requisite social security monies from the escrow account, paid the outside bookkeeper, and then refunded any remaining balance to the people designated by the bookkeeper as due a refund. The check paying the social security to the Internal Revenue Service was a check drawn on Defendant, with a separate check for each "crew leader". The "crew leaders" signed the social security return, not the check.

It is clear that not only did Griffin and Brand have the "contractual right to inspect the records of the con-

tractors at any time", *Wirtz v. Lone Star Steel, supra,* p. 670, but its relations with the harvest hands were such as to put it in the position to know or discover the wages paid to each "crew member". The Fifth Circuit Court of Appeals has held the following language applicable to Fair Labor Standards Act cases: "The statutory coverage is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service." *Shultz v. Hinojosa,* 432 F.2d 259, 264 (CA 5, 1970), quoting *Fahs v. Treegold Co-Op Growers of Florida,* 166 F.2d 40, 44 (CA 5, 1948). In this case, as a matter of economic reality, the laborers involved must depend upon Defendant to see that they receive the minimum wage.

As far as Defendant in this case is concerned, " 'good faith' under the Act does not include ignoring the obvious . . . A good faith effort to comply with the Act would have included checking their records and any further investigation necessary to ascertain the facts". *Wirtz v. Lone Star Steel, supra,* p. 670. A person or corporation may not take an "ostrich-like attitude" and still be in good faith under the Act. *Mitchell v. Hausman,* 261 F.2d 778 (CA 5, 1958). This Court therefore finds that Griffin and Brand was in violation of the "hot goods" section of the Act, in that it knew, or should have known, or the failure of the harvesting crews to attain the minimum wage as the Act mandates. 29 U.S.C. 215(a)(1). *Wirtz v. Lone Star Steel, supra.*

The Secretary herein proceeds against Griffin and Brand for alleged violations of the Child Labor provisions of the Act, 29 U.S.C.A. Sections 212, 215(a)(4), and 203(1). At trial, it was proven that some nine minors were dis-

covered working on Defendant's farms during April of 1970. Defendant, of course, urges that any such violations were "de minimus". This Court does not consider the nine violations here proven to be "de minimus"; on the contrary, Griffin and Brand, through their "crew leaders", has violated the Child Labor provisions of the Act.

Defendant vigorously disputes the propriety of an injunction in this case. This Court must take note that the Court of Appeals for the Fifth Circuit "has not been timid in requiring injunctive decrees in Fair Labor Standards Act cases, nor of candid confession minimizing the likelihood of future violation". *Gulf King Shrimp Company v. Wirtz*, 407 F.2d 508 (CA 5, 1969). Injunctions in cases involving child labor are proper, even when all violations of the law have ceased at the time of suit. *Gulf King Shrimp Co., supra.* Griffin and Brand will be enjoined from any further violations of the child labor provisions of the Act.

In sum, Defendant herein may not use the so-called "independent contractor" status of its "crew leaders" as a buffer to shield it from responsibility under the Fair Labor Standards Act, when it utilizes the labor and services of harvest hands supplied by the "crew leaders". Griffin and Brand knew, or should have known, that these laborers were being paid less than the minimum wage, and that the "crew leaders" were violating the child labor provisions of the Act, and no record of hours worked was being kept. The harvesting crews are an integral and necessary part of the production of the goods for commerce that Griffin and Brand sell, and since the test of a workman's status as employee or independent contractor for Fair Labor Standards Act purposes is in terms of economic reality rather than in technical concepts, it

makes little difference whether the harvesting crews are working for an independent contractor or Griffin and Brand. Griffin and Brand and the so-called "crew leaders" are joint employers of these harvesting hands for purposes of the Fair Labor Standards Act. *Mitchell v. John R. Crowley & Bro., Inc., et al,* 292 F.2d 105 (CA 5, 1961); *Hodgson v. Okada,* 326 F. Supp. 514 (DC Colo. 1971).

Under the facts of this case, Griffin and Brand and all others similarly engaged and using the same system for employing harvesting crews must be responsible for seeing that the harvesting crews come under the protection of the Fair Labor Standards Act.

The Secretary of Labor is therefore entitled to an injunction against Griffin and Brand, prohibiting further violations of the minimum wage, record keeping and child labor provisions of the Act. Griffin and Brand must require its "crew leaders" to keep records of hours worked by the harvest hands, see to it that the minimum wage requirement of the Act are complied with, and be responsible to see that no child labor is employed in violation of the Act.

Counsel for the Secretary of Labor will prepare an appropriate decree for entry.

The Clerk will send copies of this Memorandum, which includes the Findings of Fact and Conclusions of Law of the Court, to counsel for the parties.

Done at Brownsville, Texas, this 31st day of March, 1972.

/s/ REYNALDO G. GARZA
REYNALDO G. GARZA
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

70-B-65

JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

GRIFFIN & BRAND OF McALLEN, INC.,
Defendant

APRIL 20, 1972
JUDGMENT

This cause came on for trial without a jury, the parties being represented by their respective attorneys, and the Court after hearing the testimony of witnesses sworn and examined in open court and other evidence offered and received, and on the 31st day of March, 1972, having entered Findings of Fact and Conclusions of Law, now, pursuant thereto, it is

Ordered, adjudged and decreed that the Defendant, Griffin and Brand of McAllen, Inc., its officers, agents, servants, employees, and all persons in active concert or participation with them be, and they are hereby, permanently enjoined and restrained from violating the provisions of Sections 15(a)(2), 15(a)(4), and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq., hereinafter referred to as the Act, in any of the following manners:

(A) Defendant shall not compensate its employees engaged in commerce and in the production of goods for

commerce at rates less than $1.30 an hour, contrary to Section 6 of the Act, or at rates less than those provided by any amendment to the Act.

(B) Defendant shall not employ any oppressive child labor in commerce and in the production of goods for commerce, contrary to Section 12(c) of the Act.

(C) Defendant shall not fail to make, keep, and preserve records of employees engaged in commerce and in the production of goods for commerce, contrary to Section 11(c) of the Act and applicable regulations found in 29 CFR part 516.

It is further ordered that the Defendant require its "crew-leaders" to keep records of the hours worked by members of their respective crews, to comply with the minimum wage provisions of the Act and to not employ child labor in violation of the Act, and it is further

Ordered that the costs of the action be, and the same are hereby, taxed against the Defendant.

Dated this 20th day of April, 1972.

/s/ REYNALDO G. GARZA
United States District Judge

STATUTORY PROVISIONS AND DEPARTMENTAL INTERPRETATION

The pertinent provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. 203 et seq., are as follows:

Sec. 203(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . .

Sec. 203(e) "Employee" includes an individual employed by an employer. . .

* * *

Sec. 203(g) "Employ" includes to suffer or permit to work.

* * *

Sec. 203(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer * * * in any occupation.

* * *

Sec. 206(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(5) if such employee is employed in agriculture, not less than * * * $1.30 an hour * * *

* * *

Sec. 211(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

* * *

Sec. 212(a) No producer * * * shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed * * *.

* * *

Sec. 212(c) No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

* * *

Sec. 213(a) The provisions of sections 206 . . . shall not apply with respect to—

(6) any employee employed in agriculture (a) if such employee is employed by any employer

who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days or agricultural labor * * *.

* * *

Sec. 213(c)(1) * * * the provisions of section 212 of this title relating to child labor shall not apply with respect to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed.

* * *

Sec. 215(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 * * *; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 * * *;

* * *

(4) to violate any of the provisions of section 212 of this title;

(5) to violate any of the provisions of section 211(c) of this title.

* * *

Sec. 217 The district courts * * * shall have jurisdiction, for cause shown to restrain violations of section 215, including in the cases of violations of section 215(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act * * *.

The pertinent interpretation of the Wage and Hour Division of the Department of Labor, Opinion Letters Number 640 and 658, are as follows:

U. S. Department of Labor
Wage and Hour and Public Contracts Division
Office of the Administrator
Washington, D. C. 20210

July 19, 1967
21 AB 402.2
BC 102.11

This will reply to your letter of June 7, 1967, regarding farm labor contractors under the Fair Labor Standards Act.

The labor contractors about whom you inquire, who are also known as crew leaders, supply farmers with seasonal agricultural workers. These contractors own their own busses or trucks and perform the following activities: they deliver the workers to the farm, see that the workers are supplied with water and lunches, give some supervision to the work operation, receive the pay from the farmer and in turn pay the workers, and then return the workers to their homes at the end of the day. Contractors may contract with as many as five different farmers during a given week.

While detailed facts as to the manner of operation are not available in the information you have furnished, it appears unlikely that these crew leaders are independent contractors for purposes of the act. To be considered as the employer of the workers, a crew leader must, in addition to transporting the workers and serving as head of the group, give more than nominal supervision to the work operation and receive the pay from the farmer. In an independent contractor relationship, for example, a farmer may set out the general manner of performance

and the steps required for coordinating with the other farm operations, but the crew leader makes the day to day decision regarding the work. In such a relationship he has the authority to hire and fire the workers and direct the labor force while working in the field. Complaints by the farmer about the quality or quantity of the work or about a worker are made to the contractor or his representative, who takes whatever action is deemed appropriate.

An essential ingredient in an independent contractor's status, also, is the crew leader's opportunity for profit or loss through his supervision of the crew and its output. On the basis of general information available to us it appears that in a typical independent contractor relationship the farmer pays the contractor an agreed price per acre, row, pound, bushel, man-hour of labor, or other unit, and the contractor pays the workers at rates determined by him. Opportunity for profit or loss results through his control over the time and manner of performance of work by his crew and his authority to determine the wage rates paid to the workers.

If the labor contractor in your example exercised supervision of the crew and had opportunity for profit or loss as indicated above, he would in our opinion be an independent contractor for purposes of the act. In such a case, the crew members would be considered his employees, and compliance with the act's provisions would be considered his responsibility and not that of the farmer. The crew's man-days of labor would not be counted in determining the farmer's status under the 500 man-day test.

Sincerely yours,

/s/ Clarence Z. Lundquist
Administrator

U. S. Department of Labor
Wage and Hour and Public Contracts Division
Washington, D. C. 20210

August 2, 1967
21 AB 402.2
BC 102.14

This is in further reference to your letter of March 22, 1967, concerning the application of the Fair Labor Standards Act to farm workers furnished by crew leaders or labor contractors.

You state that you grow a large crop of vegetables each year both for market as well as for processing. At harvest time you utilize about eighty migrant workers. You make a verbal contract with their leader who is to furnish the workers, supervise the harvesting operation, and haul the vegetables on his trucks to your packing house and factory for a specified amount per unit. You have no contact with the migrant workers. The leader maintains his own records, prepares his own payroll, and pays the workers. In addition, the leader has a large investment in busses and trucks which are used in the harvesting work and for transportation purposes.

On the basis of this information contained in your letter, it appears that the leader of the migrant workers is an independent contractor for purposes of the act. In this connection, you may be interested in a recent opinion letter dated July 19, 1967.

Sincerely yours,

/s/ Frederick J. Glasgow
Special Assistant to the
Administrator

cc: Honorable Rogers C. B. Morton
Enclosure—July 19, 1967 Opinion Letter